**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 044453-01**

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| Gilbert Dube (deceased) | Employee |
| Ann Dube | Claimant |
| National Fiber Technology LLC | Employer |
| Professional Liability Insurance Co. | Insurer |

**REVIEWING BOARD DECISION**
(Judges McCarthy, Horan and Fabricant)

**APPEARANCES**
Andrew J. Schultz, Esq., for the claimant
Ellen Harrington Sullivan, Esq., for the insurer at hearing
William C. Harpin, Esq., for the insurer on appeal

**MCCARTHY, J.** The insurer appeals from a decision awarding the claimant death benefits under § 31. The hearing judge found that the employee, Gilbert Dube, suffered a work related back injury on November 7, 2001. The judge went on to find, " . . . that his mental state began to deteriorate and eventually that led to his taking his own life on December 17, 2001. . . ." (Dec. 21.) Among the gamut of issues raised by the insurer is the application of § 26A of the Act. That statute permits a dependent to recover death benefits for a suicide so long as it was the result of "such unsoundness of mind as to make the employee irresponsible for his act of suicide," when that unsoundness of mind was caused by the work injury. In this opinion, we address the insurer's contention that the employer's subsequent termination of the employee, as a bona fide personnel action under § 1(7A), was an intervening contributing cause of the employee's depression and resulting suicide, which bars the claimant's recovery as a matter of law. We disagree, and affirm the decision.

The employee sustained work-related back injuries in 1995, prior to commencing employment with the present employer. He treated over the ensuing years for ongoing back symptoms. The employee reinjured his back while working on November 7, 2001, when he jerked loose a "card" stuck in a knitting machine. (Dec. 5.) The employee left

work, received treatment and attempted to return to light duty work for his employer on November 26, 2001. He was informed that no light duty work was available and on December 4, 2001, the employee terminated Mr. Dube's employment. On December 18, 2001, the employee took his own life. (Dec. 5-6.)

Ann Dube, the employee's widow, filed a claim for death benefits under § 31 and burial expenses under § 33, along with a § 34 claim for the employee's incapacity from the date of his injury until his death. The insurer denied the claim on the grounds of liability, disability, extent of disability, causal relationship, and the application of the § 26A limitation on dependents' benefits for death resulting from suicide. (Dec. 3.) The administrative judge denied the claim at the § 10A conference. At the § 11 hearing that followed, the claimant introduced office records and a report by Dr. Bruce Cook, a neurosurgeon, who treated the employee for his low back pain for several weeks following the November 7, 2001 work injury. Dr. Cook opined that the work injury caused an exacerbation of a pre-existing back injury. (Dec. 7-8.) The employee was also seen after his injury by Dr. Philip J. Tavares, whose records the claimant introduced at the hearing. Dr. Tavares diagnosed low back injury, and found the employee to be totally disabled until November 26, 2001, when Dr. Cook conducted his examination. (Dec. 6-7.)

The claimant also introduced office records of Dr. Stephen O. Chastain, a board certified family practice physician, who had treated the employee for his low back pain. (Dec. 8.) At his deposition, Dr. Chastain opined that the employee had become depressed as a result of his work injury of November 7, 2001. Since sometime in 1993, Dr. Chastain had occasionally hired Mr. Dube to mow his lawn and fields and to do odd jobs at his home. One morning at about 8:00 a.m., several days following his termination from his job, the employee went to Dr. Chastain's home looking for work. Dr. Chastain considered the employee's unexpected visit to be very unusual. (Dec. 10.) Dr. Chastain had no light work available. The doctor and Mr. Dube then shared a cup of coffee and the employee left. Dr. Chastain never saw Mr. Dube again. Dr Chastain testified that the

employee was irritated for having allowed himself to injure his back again. (Dec. 11-12.) The doctor opined that the employee's termination from his job "put him over the edge" mentally, and that the employee's work-related "depression was substantially aggravated by the termination from work." (Chastain Dep. 85; Dec. 12.) Dr. Chastain opined that the employee's suicide was the product of his depression, and that he was of such unsoundness of mind that he was acting irrationally when he committed suicide. (Chastain Dep. 85-86; Dec. 12.)

The claimant also introduced expert medical testimony by Dr. Martin Kelly, a forensic psychiatrist. Dr. Kelly opined that the employee's depression was causally related to his back injury of November 7, 2001, that the termination from employment "substantially aggravated" the depression, and that the termination was the "predominant contributing cause" of the depression. (Kelly Dep. 19-20; Dec. 13.) Dr. Kelly opined that the employee's depression, triggered by the work injury, and substantially aggravated by the December 4, 2001 termination while still out of work and disabled, resulted in his suicide on December 17, 2001. (Dec. 13.)

Mrs. Dube testified as to her observations of her husband's post-injury depressive behavior, and the judge credited her testimony. The judge concluded that the employee had sustained a work-related back injury on November 7, 2001. (Dec. 15-16.) This injury caused an increase in pain and an accompanying deterioration of his mental state which led to his suicide on December 17, 2001. The judge adopted the opinion of Dr. Kelly, and of Drs. Chastain and Cook in part, and concluded that the employee was disabled as a result of the injury up to the time of his suicide, and that the effects of the work injury, with the subsequent causally related back pain, led to such unsoundness of mind that the employee took his own life. (Dec. 21-22.) Finally, the judge ordered that the insurer pay death and burial benefits under §§ 31 and 33, and § 34 benefits for the period between the employee's work injury and his suicide. (Dec. 22-23.)

The gravamen of the insurer's argument on appeal is that the employer's termination of the employee on December 4, 2001 intervened to cut off all causal

connection between the employee's work injury and his suicide, as a matter of law. For the reasons that follow, we conclude that a proper construction of the applicable statutory provisions does not support the insurer's contention; that the claimant established a simple causal relationship between the work injury and the suicide; and that her burden of proof was met by that showing.

We begin with the statutory language. General Laws c. 152, § 26A, provides, in pertinent part:

> Dependents shall not be precluded from recovery under this chapter . . . for death by suicide of the employee, if it be shown by the weight of the evidence that, due to the injury, the employee was of such unsoundness of mind as to make him irresponsible for his act of suicide.

St. 1937, c. 370, § 2. General Laws c. 152, § 1(7A), provides, in pertinent part:

> No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination . . . shall be deemed a personal injury within the meaning of this chapter.

St. 1985, c. 572, § 11. Our task is to harmonize these statutes. Green v. Wyman-Gordon Co., 422 Mass. 551, 554 (1996). In so doing, we must interpret and apply them, "so that effect is given to every provision in [both] of them." Id., quoting Singer, Sutherland Statutory Construction, § 51.02 at 122 (5th ed. 1992).

Section 26A sets out the circumstances under which an emotional injury or mental sequelae to a physical injury may serve as the basis for the payment of dependents' benefits under § 31. Section 31 benefits are payable to designated dependents, "[i]f death results from the injury . . . ." Id. Other than as stated in § 26A, there can be no § 31 recovery for suicide. Section 26A requires only a causal connection between the injury and the unsoundness of mind spawning the suicidal act. The section was enacted in 1937, "unquestionably . . . in view of the rule laid down in Sponatski's Case, 220 Mass. 526, 530 [1915] and Tetrault's Case, 278 Mass. 447 [1932]." Oberlander's Case, 348 Mass. 1, 5 n.1 (1964). That rule, as described by L. Locke, required proof of

> (1) insanity with (2) such delirium or uncontrollable impulse that (3) the act of suicide was involuntary. Recovery would be defeated (1) if the employee was mentally ill but not insane, or (2) if the method of self –destruction indicated a 'voluntary' choice of the injured person to die, even though (3) the choice was the product of a deranged mind, incapable of making the moral discrimination that suicide was against the law of man and nature.

L. Locke, Workmen's Compensation, § 225, p. 265 (2nd ed. 1981). Section 26A replaced, and ameliorated the harshness of, that common law rule. McCarthy's Case, 28 Mass. App. Ct. 213, 215-216 (1990).

The legislature specifically designated that findings under § 26A be made by applying the "weight of the evidence" standard of proof. No case has interpreted the inclusion of this reference in § 26A. However, according to Locke: "The most reasonable explanation for the reference to the 'weight of the evidence' in [§ 26A] is that the legislature, though changing the Sponatski test on suicide, intended to make clear that it was not changing the frequently-cited language of that case on the burden of proof." Locke, supra. That venerable test, laid down by Chief Justice Rugg in 1915, is:

> The obligation to pay compensation under the Workmen's Compensation Act . . . is absolute when the fact is established that the injury has arisen 'out of and in the course of' the employment. Part 2, § 1. It is of no significance whether the precise harm was the natural and probable or the abnormal and inconceivable consequence of the employment. The single inquiry is whether in truth it did arise out of and in the course of that employment. If death ensues, it is immaterial whether that was the reasonable and likely consequence or not; the only question is whether in fact death 'results from the injury.' Part 2, § 6. When that is established as the cause, then the right to compensation is made out. If the connection between the injury as the cause and the death as the effect is proven then the dependents are entitled to recover even though such a result before that time may never have been heard of and might have seemed impossible. The inquiry relates solely to the chain of causation between the injury and the death.

Sponatski, supra at 531. "The burden rest[s] upon the claimant of showing that the employee's death resulted from his injury and not from an independent intervening cause." Tetrault, supra at 447, 448, citing Panagotopulos's Case 276 Mass. 600, 605 (1931). See McCarthy, supra (claimant must show employee was suffering from work-

related mental illness or unsoundness of mind which, in turn, caused the suicide); Lambert's Case, 364 Mass. 832 (1973)(court affirmed award where medical evidence showed causal relationship between back injury, psychosis it generated, and resulting suicide). Enacted in 1937, the legislature has never amended § 26A. The simple causation standard imported from the pre-enactment case law therefore remains the standard for dependents seeking § 31 death benefits for an employee's suicide under § 26A.

On the other hand, the bona fide personnel action exception to compensable mental disabilities was enacted in response to Kelley's Case, 394 Mass. 684 (1985), in which the court held that the employee's emotional disability, brought on by an internal job transfer, was a compensable personal injury under the act. Id. at 689. At issue in that case was disability, not dependents' benefits, and the provision of § 1(7A) reacting to Kelley is specific in its terms: "No mental or emotional *disability* arising principally out of a bona fide, personnel action . . . shall be deemed to be a personal injury within the meaning of this chapter." When the legislature enacted the bona fide personnel action bar and raised the standard of proving causation in emotional disability claims to "significant" in 1985, and when it amended that heightened standard for emotional disabilities to "predominant" in 1991, § 26A remained untouched and intact. Where no qualifications have been added over the years to a dependent's entitlement to death benefits for a suicide under § 26A, we will not infer them. The legislature is presumed to have been aware of the long-standing simple causation language of § 26A when it raised the causal relationship standard to establish compensability for emotional disability in 1985 and again in 1991. See Taylor's Case, 44 Mass. App. Ct. 495, 50 (1998)(legislature presumed to have been aware of effect of unamended § 35B on 1991 amendments to other sections of act). Nowhere do we see an indication that the legislature intended similar limitations on death benefits stemming from a work-related suicide, particularly in light of its importation of the Sponatski/Tetrault simple causation standard. See Locke, supra.

We also find support for the disparate treatment of employee disability claims and dependents' claims in Walker's Case, 443 Mass. 157 (2004). That case contemplated the 1981 inclusion within § 36A of a specific loss entitlement due to brain damage. Section 36A historically contemplated the payment of § 36 specific loss benefits to dependents, where the employee died prior to full payment of such benefits. The court concluded that the subject brain damage provision was to be applied only in cases of the employee's death, reasoning that "the Legislature left intact [in its later amendments] the distinction between compensation payable to an employee who survives his injuries, as described in § 36, and the compensation payable to the employee's survivors on his death, described in § 36A." Id. at 166.

We conclude that a suicide is within the purview of § 26A if it is simply causally connected to the unsoundness of mind resulting from the injury, without having to show any particular quantity or quality of that cause. We consider this to be the case, even in view of intervening causally related events, such as the termination in the present case. We have analogously concluded that an insurer is liable for a work-related disability, even when a non-work-related contributing cause intervenes, so long as "any causal connection" remains between the work injury and the disability. Bemis v. Raytheon, 15 Mass. Workers' Comp. Rep. 408, 412-413 (2001)(work-related carpal tunnel syndrome disability remained compensable, even though subsequent pregnancy also contributed to the disability); Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 162-163 (2002)(intervening and contributing swimming pool accident would be relevant to compensability of work-related back disability only if it was result of unreasonable activity on employee's part); Morgan v. Seaboard Products, 14 Mass. Workers' Comp. Rep. 280, 283-284 (2000)(subsequent non-work-related slip and fall contributing to work-related back impairment and need for surgery did not cut off compensation insurer's liability where medical opinion was that both events contributed to the resultant back condition).

Here the adopted medical evidence supported the judge's award of death benefits, because the doctors causally related the suicide both to the work injury and to the termination. That Drs. Kelly and Chastain put more emphasis on the termination – that it was the "predominant" cause that "substantially aggravated" the work-related depression – does not affect this analysis. The claimant established the simple causal connection required under § 26A and rightly prevailed in her § 31 claim as a result.

Accordingly, we affirm the decision.[1] The insurer is directed to pay the claimant's attorney a fee of $1,357.64 under the provisions of § 13A(6).

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***March 8, 2006***

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

[1] We summarily affirm the decision as to all of the insurer's other arguments on appeal.